

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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In the Matter of:

Amendment of the Commission's Rules  
Governing Hearing Aid-Compatible Mobile  
Handsets

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WT Docket No. 07-250

**PETITION FOR PARTIAL RECONSIDERATION**

Pursuant to Section 1.429 of the Commission's Rules,<sup>1</sup> LG, Motorola, Nokia, Research In Motion, Samsung, and Sony Ericsson (collectively "Joint Petitioners")<sup>2</sup> hereby petition for partial reconsideration of the Commission's *Second Report and Order* in the above-captioned proceeding.<sup>3</sup>

The Joint Petitioners seek reconsideration of the Commission's decision to limit the applicability of the rule that allows handset manufacturers to enable user-controlled transmit power reductions of up to 2.5 decibels to demonstrate compliance with the Commission's hearing aid compatibility ("HAC") rules for digital mobile handsets operating on the GSM air interface in the 1900 MHz band.<sup>4</sup> As adopted, this "power down" rule draws lines between similarly situated companies in ways that are inconsistent with the Commission's commitments

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<sup>1</sup> 47 C.F.R. § 1.429.

<sup>2</sup> Specifically, the following entities comprise the Joint Petitioners: LG Electronics MobileComm U.S.A., Inc. ("LG"), Motorola, Inc. ("Motorola"), Nokia Inc. ("Nokia"), Research in Motion Corp. ("Research in Motion"), Samsung Information Systems America, Inc. ("Samsung"), and Sony Ericsson Mobile Communications (USA) Inc. ("Sony Ericsson").

<sup>3</sup> See Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets, WT Docket No. 07-250, *Policy Statement and Second Report and Order and Further Notice of Proposed Rulemaking*, FCC 10-145 (rel. Aug. 5, 2010) ("*Second Report and Order*").

<sup>4</sup> *Id.* at 20-22 ¶¶ 51-56.

to competitive and technological neutrality and the restrictive applicability is not supported by the record. The Commission should therefore reconsider this action and instead apply the power down rule uniformly to all manufacturers of GSM handsets that operate in the 1900 MHz band.

## **I. BACKGROUND.**

In the *Second Report and Order* adopted in August, the Commission made certain changes to the HAC *de minimis* rule to prevent large manufacturers from avoiding HAC compliance by choosing to produce no more than two handset models per air interface in perpetuity.<sup>5</sup> Apple, whose iPhone has been excluded from the HAC requirements under the original version of the *de minimis* rule, submitted a last minute *ex parte* letter asking the Commission to adopt an exception to the new version of the rule that was under consideration at the time.<sup>6</sup> Anticipating that it would no longer qualify for a *de minimis* exception, Apple asked that the Commission allow manufacturers to demonstrate compliance with the HAC rules for the GSM air interface in the 1900 MHz band through a user-selected feature that reduces the maximum transmit power of the handset in order to reduce the RF interference caused to hearing aids.<sup>7</sup> Apple justified its request by stating that “[a]chieving hearing aid compatibility in the 1900 MHz frequency band when operating on legacy GSM 2G networks presents a particularly difficult technical challenge for manufacturers, especially for desirable handset form factors with thin enclosures.”<sup>8</sup>

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<sup>5</sup> See *Second Report and Order* at 16 ¶ 40.

<sup>6</sup> See Letter from Paul Margie, Counsel to Apple Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 07-250 (filed July 9, 2010) (“*Apple July 9 Letter*”).

<sup>7</sup> *Id.* at 1, 3.

<sup>8</sup> *Id.* at 1.

The Commission adopted Apple’s proposal as requested and limited its applicability to those manufacturers that would qualify for the *de minimis* rule but for their size. Thus, the Commission’s actions ensure that the main beneficiary of this exception to its newly adopted rule would be the very company and for the very product that the rule was intended to capture.<sup>9</sup>

## **II. THE LIMITATIONS ON AVAILABILITY OF THE POWER DOWN RULE ARE FUNDAMENTALLY UNFAIR.**

The Joint Petitioners seek reconsideration of the Commission’s decision to restrict eligibility to meet HAC compliance through a power reduction for GSM phones operating on the 1900 MHz band. Nothing in the record supports limiting the power down rule to manufacturers who, but for their size, would have been subject to the *de minimis* exception. Without addressing the appropriateness of this technological solution as a substantive matter, the Joint Petitioners believe that to the extent that it serves the public interest for the Commission to issue M3 ratings to GSM phones using a power down exception for some manufacturers, it must do so for all manufacturers. As such, the Commission should immediately make the power down option available to all manufacturers of GSM phones.

### **A. The Commission’s Decision Violates Principles of Fundamental Fairness and Competitive Neutrality.**

Reaching HAC compliance is a technical challenge that every manufacturer has had to deal with, demanding the dedication of substantial financial and intellectual resources. The Joint Petitioners, recognizing the important public interest in ensuring that users of hearing aids and cochlear implants have equal access to and use of innovations in mobile technology, have expended the resources necessary to accomplish these goals. However, to the extent that the Commission provides additional flexibility to Apple that is not made available to other

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<sup>9</sup> See *Second Report and Order* at 15 ¶ 37 (discussing the Apple iPhone’s use of the *de minimis* rule as one motivation for the rule change).

manufacturers, it is unfairly interfering in a competitive market on behalf of an established, well-funded, and highly successful player. This decision is in direct contravention of the Commission's commitment to competitive neutrality, and should be reconsidered.

The question of whether to extend the power down rule to all manufacturers of GSM handsets for the 1900 MHz band is raised in the *Further Notice of Proposed Rulemaking* adopted concurrently with the *Second Report and Order*.<sup>10</sup> This is not sufficient, however, to address the fundamental unfairness of the Commission's decision. It is unclear how long the Commission will take to resolve that proceeding, which also deals with other important and complex matters. Considering the present *Second Report and Order* is itself responsive to a *Notice of Proposed Rulemaking* issued nearly three years ago,<sup>11</sup> it is quite possible that final rules would not be adopted in this proceeding until after the changes to the *de minimis* rule and the power down rule go into effect. While Apple already enjoys the valuable regulatory certainty that comes with knowing exactly when it will no longer be subject to the *de minimis* rule and when it may take advantage of the power-down option, its competitors must take a "wait-and-see" approach and cannot begin implementing the power down option into any of their design plans. The Joint Petitioners believe that the Commission is rewarding Apple for making a strategic business decision to avoid being subject to the HAC rules. Equally alarming, the Commission is simultaneously penalizing those competitive manufacturers that have chosen to produce a larger variety of phones targeted to a broader segment of the market, including many HAC compliant models.

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<sup>10</sup> See *Second Report and Order* at 35-36 ¶¶ 99-101.

<sup>11</sup> See Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets, WT Docket No. 07-250, *Second Report and Order and Notice of Proposed Rulemaking*, 22 FCC Rcd 19670 (2007).

**B. No Evidence Supports Limiting the Power Down Rule To Manufacturers Producing Fewer than Three Handsets Per Air Interface.**

The Commission's decision to make the power down rule available only to manufacturers who, but for their size, would otherwise have been subject to the *de minimis* rule is not justified by any evidence or policy rationales, and thus should be reconsidered.

Apple claims that there are unique problems meeting HAC compliance with desirable form factors in the 1900 MHz.<sup>12</sup> However, because it has long been subject to the *de minimis* rule, it has not had the same regulatory incentives to innovate and solve these problems as have other companies. As a result, while the iPhone is still not HAC compliant, other manufacturers, which were not subject to the *de minimis* exception, have developed many advanced, touchscreen handsets with similar form factors and equivalent or greater functionality than the iPhone and have managed to make these phones hearing aid compatible for the GSM air interface at 1900 MHz.<sup>13</sup> It would establish a perverse incentive for the Commission to provide regulatory relief only to those parties that fail to dedicate the substantial time, creativity, and money required to overcome these challenges, despite having sufficient resources and ample time (*i.e.*, two years) to do so.

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<sup>12</sup> See *Apple July 9 Letter* at 1.

<sup>13</sup> A review of the hearing aid compatibility outreach information provided by the major wireless carriers demonstrates that several of the most advanced GSM touchscreen handsets operating on the 1900 MHz band are HAC rated. See, e.g., AT&T Inc., *Hearing Aid Compatibility and Wireless Phones*, <http://www.wireless.att.com/learn/articles-resources/disability-resources/hearing-aid-compatibility.jsp> (listing Motorola Backflip, and Samsung Captivate as at least M3 or M3/T3 rated phones) (last visited Oct. 8, 2010); T-Mobile USA Inc., *T-Mobile Accessibility: TTY Policy*, [http://www.t-mobile.com/Company/Community.aspx?tp=Abt\\_Tab\\_Safety&tsp=Abt\\_Sub\\_TTYPolicy](http://www.t-mobile.com/Company/Community.aspx?tp=Abt_Tab_Safety&tsp=Abt_Sub_TTYPolicy) (listing Samsung Vibrant as M3/T3 rated) (last visited Oct. 8, 2010). Moreover, there are many similarly featured advanced touchscreen handsets operating over other bands and air interfaces. See, e.g., Verizon Wireless, *Hearing Aid Compatible Products*, <http://aboutus.vzw.com/accessibility/products.html> (listing Motorola DROID X and DROID 2, and Samsung Fascinate as HAC-rated handsets) (last visited Oct. 8, 2010).

The Commission’s own public interest analysis for adopting the power down rule does not support its decision to limit the manufacturers to which it would apply. The Commission based its decision on the fact that “[c]ertain technological choices in handset form and function, such as thin form factors and touch screens, increase the difficulty of meeting the ANSI standard for these handsets while bringing unique benefits to consumers.”<sup>14</sup> The Commission was also concerned that strict application of the rules would prompt some manufacturers to “choose to produce additional models with no unique features that are not demanded by the market” simply to meet the HAC compliance requirements.<sup>15</sup> However, this is no more true for Apple than for any other competitor. Indeed, to the extent that the Commission’s decision, as drafted and conditioned, serves the public interest when applied to large companies that produce a small number of handset models, there is no justification for withholding this flexibility from all competitive manufacturers of comparable products.

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<sup>14</sup> *Second Report and Order* at 21 ¶ 52.

<sup>15</sup> *Id.*

### III. CONCLUSION.

For the reasons detailed above, the parties respectfully request that the Commission reconsider the limitations it applied to its newly-adopted rule allowing manufacturers of GSM handsets to demonstrate HAC compliance while using a user-initiated power reduction. As adopted, the rule violates fundamental principles of fairness and neutrality. On reconsideration the Commission should immediately apply the power down rule to all manufacturers of GSM handsets that operate in the 1900 MHz band.

Respectfully submitted,

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